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Mohd Hussin bin Abd Karim v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–183–06 OF 2011
LINTON ALBERT, LIM YEE LAN AND UMI KALTHUM JJCA
12 SEPTEMBER 2014

C

Criminal Law — Murder — Common intention — Deceased died after simultaneous assault by accused and another person still at large — Difficulty in determining whose acts actually caused the death — Whether s 34 of the Penal Code applied to meet such a case — Whether events which took place in assault of deceased showed existence of mens rea and common intention to cause deceased's death

D

The appellant ('the accused') was sentenced to death by the High Court after it found him guilty of murdering another man ('the deceased') together with another person still at large and in furtherance of a common intention between them to commit the murder. The deceased was drinking beer in a cafe one night when he sent two of the four bottles of beer he ordered to a nearby table where the accused and five others were seated. When the bill for payment of the beers arrived, the deceased told the accused he had no money and told him to pay the charges instead and walked away. The accused became enraged and hit the deceased's face with a beer glass. At that juncture, the accused's friend, Kampong, who is the person at large referred to in the charge, joined in the attack on the deceased and in the ensuing melee, the deceased was hit on the head with beer bottles, a flower pot and plants. The accused and Kampong then ran away. The deceased was dead upon arrival at the hospital. In his defence, the accused said he was drunk at the time and did not know what he was doing. He also said the beer glass he hit the deceased with could not have caused the death but it was Kampong's use of the flower pot. The trial judge held s 34 of the Penal Code applied because it could not be determined whether it was the injuries inflicted by the accused or by Kampong which caused the death. In the instant appeal against conviction and sentence, the accused said he had no intention to kill the deceased and there was no common intention between him and Kampong to do so.

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Held, dismissing the appeal and affirming the conviction and sentence:

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(1) Section 34 of the Penal Code applied in this case as it was difficult to distinguish between the acts of the accused and the acts of Kampong. There was no requirement to prove who actually or ultimately caused the deceased's death (see para 19).

(2) The existence of mens rea and common intention between the accused and Kampong could be inferred from the sequence of facts found by the trial judge. This included the accused hitting the deceased with a beer glass; then Kampong and the accused hitting the deceased on the head with beer bottles causing him to fall to the ground; Kampong was then seen hitting the deceased on the head with a flower pot; the accused then tried to use a metal drain cover to hit the deceased but was prevented from doing so by another person; the accused was then seen hitting the deceased with a plant from the nursery. Based on the events that took place, the trial judge did not find the accused to have been intoxicated or drunk. An appellate court should not disturb the findings of fact by the trial judge and there was no reason to do so in this case (see paras 21–22).

(3) The numerous injuries on the deceased inflicted by the accused and Kampong were intended to cause death or to cause bodily injuries likely to cause death or sufficient in the ordinary course of nature to cause death. The trial judge had considered the issues of mens rea and common intention to commit murder and had adequately considered the defence's case. There were no merits in the appeal and the conviction of the accused was safe (see paras 23–24).

[Bahasa Malaysia summary

Perayu ('tertuduh') telah dihukum mati oleh Mahkamah Tinggi selepas mendapati perayu bersalah membunuh seorang lelaki lain ('si mati') bersama seorang lain yang masih bebas dan berikutan niat bersama antara mereka untuk melakukan pembunuhan. Si mati sedang meminum bir dalam kafe pada suatu malam apabila dia menghantar dua daripada empat botol bir yang dipesan olehnya ke meja berdekatan di mana tertuduh dan lima yang lain sedang duduk. Apabila bil untuk bayaran bir tiba, si mati memberitahu tertuduh yang dia tiada wang dan memberitahunya untuk membayar caj itu sebaliknya dan berlalu pergi. Tertuduh menjadi marah dan memukul muka si mati dengan gelas bir. Pada masa itu, kawan tertuduh, Kampong, yang merupakan orang yang masih bebas yang dirujuk dalam pertuduhan itu, telah menyertai serangan ke atas si mati dan dalam huru-hara berikutnya, si mati telah dipukul di kepala dengan botol-botol bir, pasu bunga dan tumbuh-tumbuhan. Tertuduh dan Kampong kemudian telah melarikan diri. Si mati telah meninggal dunia ketika tiba di hospital. Dalam pembelaannya, tertuduh berkata dia mabuk pada masa itu dan tidak mengetahui apa yang dilakukannya. Dia juga berkata gelas bir yang digunakan untuk memukul si mati tidak mungkin telah menyebabkan kematian dan bahawa ia adalah disebabkan penggunaan pasu bunga oleh Kampong. Hakim perbicaraan telah memutuskan s 34 Kanun Keseksaan terpakai kerana ia tidak boleh menentukan sama ada ia adalah kecederaan yang disebabkan oleh tertuduh atau oleh Kampong yang menyebabkan kematian itu. Dalam rayuan ini terhadap sabitan dan hukuman, tertuduh mengatakan dia tiada niat untuk

membunuh si mati dan tiada niat bersama antara dia dan Kampong untuk berbuat demikian. A

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Seksyen 34 Kanun Keseksaan adalah terpakai dalam kes ini kerana ia sukat untuk membezakan antara tindakan tertuduh dan tindakan Kampong. Tiada keperluan untuk membuktikan siapa sebenarnya atau akhirnya yang menyebabkan kematian si mati (lihat perenggan 19). B

(2) Kewujudan mens rea dan niat bersama antara tertuduh dan Kampong boleh disimpulkan daripada turutan fakta yang didapti oleh hakim perbicaraan. Ini termasuklah tertuduh memukul si mati dengan gelas bir; kemudian Kampong dan tertuduh dilihat telah memukul si mati di kepala dengan pasu bunga; tertuduh kemudian telah cuba menggunakan penutup longkang besi untuk memukul si mati tetapi telah dihalang daripada berbuat demikian oleh seorang yang lain; tertuduh kemudian dilihat memukul si mati dengan suatu tumbuhan dari nurseri itu. Berdasarkan kejadian yang berlaku, hakim perbicaraan tidak mendapati tertuduh dalam keadaan mabuk atau mabuk. Mahkamah Rayuan tidak patut mengganggu penemuan fakta oleh mahkamah perbicaraan dan tiada sebab untuk berbuat demikian dalam kes ini (lihat perenggan 21–22). C D E

(3) Pelbagai kecederaan ke atas si mati yang disebabkan oleh tertuduh dan Kampong adalah bertujuan untuk menyebabkan kematian atau menyebabkan kecederaan badan yang mungkin menyebabkan kematian atau mencukupi dalam keadaan biasa menyebabkan kematian. Hakim perbicaraan telah mengambil kira isu-isu mens rea dan niat bersama untuk melakukan pembunuhan dan sewajarnya telah mempertimbangan kes pembelaan. Tiada merit dalam rayuan dan sabitan tertuduh adalah selamat (lihat perenggan 23–24).] F G

Notes

For cases on common intention, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1571–1574. H

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] CLJ (Rep) 241, SC (refd)

Ahmad Majmi bin Idris & Anor v PP and another appeal [2014] 3 MLJ 368, CA (refd) I

Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749, FC (refd)

Legislation referred to

Penal Code ss 34, 302

Appeal from: Criminal Case No K45-02 of 2010 (High Court, Kota Kinabalu)

Ram Singh (Ram Singh Harban & Co) for the appellant.
Farah Ezlin bt Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Umi Kalthum JCA:

[1] The appellant/accused (accused) was charged for an offence of committing murder punishable under s 302 of the Penal Code ('the Code') and read together with s 34 of the same Code. The charge reads as follows:

> That you together with one person still at large on 10th May 2009, at about 1.30am, at Tamu Ground Area, Pekan Keningau, in the District of Keningau, in the State of Sabah, in furtherance of a common intention of you all, did commit murder by causing the death of one, KEDIN BIN REPAD (M) (NRIC: 580102-12- 6709) and that you have thereby committed an offence punishable under Section 302 of the Penal Code and read together with Section 34 of the same Code.

THE PROSECUTION'S CASE

[2] On 10 May 2009 at about 12 midnight, Kedin bin Repad ('the deceased') went to Tempinai Cafe which was situated in the Tamu Ground, Keningau, Sabah. He sat at a table and ordered four bottles of beer. When the beer arrived, he asked for two bottles to be delivered as per his treats to the next table where the accused and five of his friends were seated. The deceased appeared to be intoxicated. When it was time to close the cafe, 'PW3' (Marilenane bt Marcos), whose mother operated the cafe, wrote out the bill. The accused offered to assist to send the bill and collect the payment from the deceased. The accused sent the bill to the deceased who gave an envelope to the accused for the payment. The accused brought the envelope to PW3 at the counter of the cafe and offered to open the envelope. When he opened the envelope, there was no money inside. The accused tore the envelope and went back to the deceased's table. The deceased stood up and said 'I do not have any money, you pay yourself, if you are not satisfied with me, just kill me' and walked towards the nursery next to the cafe. The accused who was then seated at the deceased's table took a beer glass and hit the deceased in the face. A friend of the accused who was known as Kampong and seated at the next table, and is the person still at large referred to in the amended charge, joined in to attack the deceased. The deceased was hit on the head and other parts of his body with beer bottles, flower pots and ornamental plants contained in plastic bags. The

accused and Kampong ran away, the police was called and the deceased was brought in dead to the Keningau Hospital.

[3] At the end of the prosecution's case, the learned trial judge was satisfied, after subjecting the evidence adduced by the prosecution to a maximum evaluation, that the prosecution was successful in proving a prima facie case against the appellant and called upon the appellant to tender his defence.

THE ACCUSED'S DEFENCE

[4] The accused chose to give his evidence on oath. The accused's main defence was that on 10 May 2009, the accused and his friend named 'Kampong' had been drinking at different places in Keningau before they went to Tampinai Cafe late at night to continue their drinking. He said there were seven of them seated at their table at the cafe, namely Kampong, Ben, three men who were Butons but he did not know their names, a woman ('PW6') and himself.

[5] The drinks were paid by the Butons. They were given two bottles of beer and told by a waitress that the beer was ordered by and given to them as a treat from the deceased. The accused said that subsequently the waitress handed them a bill for the two bottles of beer plus another two bottles consumed by the deceased and that the deceased did not pay for the beer. The accused said that he asked the deceased to pay for the beer and the deceased gave him an envelope which he brought to the waitress. The waitress told him the envelope was empty and the deceased alleged that the accused had taken the money.

[6] The accused said that he was drunk at that time and without realising, he hit the deceased with a beer glass. Kampong suddenly kicked the deceased and hit the deceased's head three times using a flower pot. He said Ben then hit the deceased's head with a beer bottle. Suddenly, a well built man with long hair appeared and calmed him down and asked him to go away. The accused said that he ran towards Kampong and grabbed Kampong and brought Kampong along with him but Kampong refused and he ran away with Ben. He then waited for Kampong at the village, who came after 30 minutes, and they went home. He was arrested by the police the next day. The police did not arrest Kampong or Ben. The accused said that he hit the deceased in the face with the beer glass which shattered on impact. The shattered beer glass cut three of his fingers.

[7] The defence of the accused was that he was drunk at the material time and he did not know what he was doing.

[8] At the end of defence case, the learned trial judge held that the accused had failed to raise any reasonable doubt on the prosecution's case and that the prosecution had proven its case beyond reasonable doubt. The appellant was found guilty as charged and sentenced to death as mandated under s 302 of the Code.

THE APPEAL

[9] Before us, the accused challenged the decision of the learned trial judge on the ground that the learned trial judge had erred in his findings and subsequently convicted the accused on the charge. The accused raised two grounds, namely:

(a) that the accused had no intention (mens rea) to murder the deceased; and

(b) that there was no common intention between the accused and Kampong to murder the deceased.

Mens rea

[10] Learned counsel for the accused submitted that PW3 in her evidence had stated that the accused had hit the deceased with the beer glass on the face. This was corroborated with the evidence of PW5 who saw the accused took the beer glass. PW3 during cross-examination confirmed that she did not see what Kampong or the accused did to the deceased. 'PW5' in her testimony stated that she could not remember how many times the accused hit the deceased. PW5 could not remember where the accused was when the other man (Kampong) hit the deceased with the flower pot.

[11] The accused's counsel further submitted that the accused did not hit the deceased's head with the flower pot. The man who had hit the deceased with beer bottle and flower pot was Kampong which resulted in bleeding on the deceased's face. Learned counsel further submitted that the accused hit the deceased with a beer glass and this did not cause the death of the deceased. The learned trial judge had accepted the fact that it was Kampong who hit the deceased on the head with a flower pot based on the evidence of PW5. However the learned trial judge had erred in his finding that the accused and Kampong had inflicted injuries on the deceased which resulted in the death of the deceased. It was a misconception of fact and inconsistent with the evidence of 'PW4' in her report P9.

[12] It was submitted that the deceased's head injury was due to blunt force trauma and the possible weapon to inflict such injuries which were consistent with a blunt object probably oval or circular in shape like some kind of pottery

like a flower pot. From the evidence adduced during the trial, it was Kampong who had used the flower pot to hit the deceased's head until the flower pot was broken. It was Kampong who hit the deceased with the flower pot till it broke when the deceased was already lying on the ground.

[13] In reply the learned deputy for the respondent submitted that from the facts of the case it showed that the accused was the one who initiated the blow on the deceased and was followed by Kampong.

Common intention

[14] The accused's counsel submitted that from the evidence adduced by PW3, PW5 and PW6 it was Kampong's sole act of inflicting the fatal blow to the deceased, therefore there is no need for the charge to be read together with s 34 of the Penal Code. The learned trial judge had erred when he stated that:

> No doubt it was not possible to determine whether it was the injuries inflicted by the accused which caused the death of the deceased or it was those inflicted by Kampong which caused the death of the deceased. This is where s 34 comes in. The provision is intended to meet a case in which it may be difficult to distinguish between acts of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them (refer AR at p 244, lines 13–19).

[15] The accused reiterated that it was Kampong who had caused the fatal blow on the deceased's head using the flower pot until it broke.

[16] The learned deputy in response submitted that the fact that both the appellant and Kampong had mercilessly beaten the deceased's head and therefore showed that both of them had the common intention to inflict injuries knowingly that it would cause death to the deceased.

[17] The learned deputy cited s 34 of the Penal Code and submitted that the common intention between the accused and Kampong could be at the spur of the moment and need not necessarily be prearranged. He quoted the Supreme Court case of *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] CLJ (Rep) 241, where Syed Agil Barakbah SCJ said:

> The main ground touched upon by the fourth appellant's counsel was that the learned judge erred in law in failing to appreciate that the evidence adduced by the prosecution pertaining to 'common intention' was far from satisfactory. In other words, it was the defence contention that the prosecution had failed to prove that the fourth appellant had committed the offence 'in furtherance of the common intention' of all the four appellants and he should have been acquitted by the trial judge at the close of the defence. Section 34 of the Penal Code states:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*The Supreme Court (of India) on Criminal Law (1950–1960)* by JK Soonavala pp 188–193).

[18] The two issues raised by the accused are related. We will deal with them together.

[19] We found that there was no merit in the submission of the accused that the accused had no intention to commit murder. There was no material fault by the learned trial judge in his findings. Section 34 of the Penal Code was applicable in this case when it was difficult to distinguish between the acts of the accused and the acts of Kampong (para 25 grounds of judgment). We were of the view that there was no requirement to prove who actually or ultimately caused the death of the deceased. In the Court of Appeal case of *Ahmad Majmi bin Idris & Anor v Public Prosecutor and another appeal* [2014] 3 MLJ 368, Azahar bin Mohamed JCA said:

> [18] We found the submission of learned counsel lacked merit. For the proper determination of this issue, it is important to bear in mind that both the appellants together with another person still at large were charged for the common intention under s 34 of the Code of murdering the deceased. Section 34 provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. In our judgment, when s 34 of the Code is invoked, there is no requirement to prove who actually or ultimately caused the death of the deceased as was held in *Ong Chee Hoe v Public Prosecutor* [1999] 4 SLR 688:
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> > In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v Emperor* AIR 1925 PC 1, the court stated:
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> > > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention,

each person is liable for the result of them all, as if he had done them himself.

[20] In *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749, Zulkelli FCJ held at p 764:

> [33] It is a well established principle of law in dealing with the criminal liability under s 34 of the Penal Code that a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case (see the cases of *Mahbub Sha v Emperor* AIR 1945 PC 118 and *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344).

[21] In our present case, and based on the authorities cited by the learned deputy, we were of the view that the existence of mens rea and common intention between the accused and Kampong can be seen/inferred from the following sequence of facts as found by the learned trial judge:

(a) the accused, Kampong and others were seated together at an adjoining table to the deceased's table drinking;

(b) the accused had offered to assist PW3 to send the bill and collect the payment from the deceased;

(c) the accused sent the bill to the deceased, who gave envelope to the accused for the payment;

(d) the accused brought the envelope to PW3 and offered to open the envelope. Upon opening the envelope the accused found there was no money inside;

(e) the accused tore the envelope and went back to the deceased's table to confront the deceased;

(f) the deceased stood up and said 'I do not have any money, you pay yourself, if you are not satisfied with me, just kill me', and walked towards the nursery next to the cafe;

(g) the accused started the fray by taking a beer glass from the table where the deceased was seated and hit the deceased in the face (evidence of PW3, PW5);

(h) a friend of the accused, Kampong, who was seated at the next table, joined in to attack the deceased. PW6 said she saw Kampong hitting the deceased on the head with a beer bottle which he took from the table where she was seated (together with the accused and Kampong). This was followed by the accused who picked up a beer bottle and hit the

deceased on the head with the beer bottle. The deceased then fell to the ground. At this time, the accused, Kampong and the deceased were at the nursery. PW6 went up to them to ask them to stop fighting but was not successful;

(i) PW6 then saw Kampong hitting the deceased on the head with a flower pot from the nursery. The accused then tried to use a metal drain cover to hit the deceased but was prevented from doing so by a big-sized man with long hair who was present at the scene. PW6 then saw the accused hit the deceased with a plant from the nursery; and

(j) the trial judge found the accused not to be intoxicated or drunk although he had consumed alcohol prior to and at the time of the attack on the deceased by the fact that the accused together with Kampong and Ben were able to walk to Ben's house via the Tamu ground where they met Kampong's friends and were invited for a drink at the cafe. During the drink the accused was alert to his surroundings, the presence of the deceased at the next table, the two bottles of beer sent to their table by the deceased, the deceased did not pay for the four bottles of beer he (the deceased) had ordered, the accused had volunteered to collect the payment from the deceased up to the time the accused wanted to take the metal drain cover intending to hit the deceased with it but was stopped by the big-sized person with the long hair, and thereafter the accused told the waitress not to call the police and was able to ask Kampong to run away with him and Ben.

[22] It is trite law that an appellate court should not disturb the findings of fact by the trial judge, and we do not find any reason to do so.

[23] After reading the full grounds of judgment of the learned trial judge, we found that the learned trial judge had considered the issue that the accused and Kampong had the mens rea and common intention to commit murder. This can be seen from the numerous injuries sustained by the deceased inflicted by the accused and Kampong on the deceased with the intention of causing death or with the intention of causing bodily injuries to be likely to cause death or with the intention of causing bodily injuries to the deceased which injuries were sufficient in the ordinary cause of nature to cause death, even though in the final analysis, according to PW4, the cause of death was due to the head injury due to or as a consequence of blunt force trauma. Based on the evidence of PW4, that head injury was apparently inflicted by Kampong when he used the flower pot to hit the deceased on the head.

[24] We agreed with the learned trial judge that the prosecution had proven its case beyond reasonable doubt. We found the learned trial judge had adequately considered the defence case and we found there were no merits in

the appeal. We were also satisfied that the conviction of the appellant was safe. We therefore unanimously dismissed the appeal and affirmed the conviction and sentence imposed by the learned trial judge.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar